

WELIGAMA MULTI PURPOSE CO-OPERATIVE SOCIETY LTD.

v.

CHANDRADASA DALUWATTA

SUPREME COURT

SAMARAKOON, C. J., SHARVANANDA, J., WANASUNDERA, J., WIMALARATNE, J. AND COLIN-THOME', J.

S C.No. 38/82-C.A.No. 2038/80

FEBRUARY 2, 1984.

Writ of Mandamus to compel co-operative society to pay half month's salary from 7th month after interdiction pending conclusion of inquiry- Co-operative Societies Act, No. 5 of 1972 - Co-operative Employees Commission Act, No. 12 of 1972, Sections 11, 14, 25 and 32 - Clause 7 (1) of Circular No. 18/75 of 23.7.1975 issued by the Secretary of the Co-operative Employees Commission.

The petitioner-respondent was employed as the Manager of the appellant Co-operative Society until his interdiction on 9.10.1972. On 30.8.1980 he was served with a charge sheet. He filed this application seeking a Writ of Mandamus compelling the appellant Society to pay him half month's salary from the seventh month of interdiction in terms of clause 7 (1) of Circular No. 18/75 of 23.7.1975 issued by the Secretary of the Co-operative Employees Commission which stated that an interdicted employee was entitled to such payment pending conclusion of the inquiry against him. The appellant Society resisted the application on the ground, inter alia, that it owed no public or statutory duty to the petitioner-respondent to pay the half month's salary from the seventh month of interdiction as claimed. The Court of Appeal rejected this defence and issued a Writ of Mandamus compelling payment.

Held-

The language of clause 7 (1) does not permit reading into it the power to impose an obligation to pay a salary during the period of interdiction; such a mandate cannot be related to procedure respecting disciplinary inquiries. In any event such directions cannot be elevated to a regulation having statutory efficacy

Mandamus lies to secure the performance of a public duty, in the performance of which an applicant has sufficient legal interest. To be enforceable by Mandamus the duty to be performed must be of a public nature and not of a merely private character. A public duty may be imposed by statute, charter or the common law or custom.

The duty prescribed by clause 7 of the Circular No. 18 of 1975 is not in the nature of a public duty such as to attract the grant of a Writ of Mandamus for its enforcement.

Mendis v. Hakmana Textile Weavers Co-operative Society Ltd. C.A.No. 378/78 C.A. Minutes of 21.1.1979 was wrongly decided.

Cases referred to

- (1) *Mendis v Hakmana Textile Weavers Co-operative Society Ltd.*, C.A.No. 378/78 C.A. Minutes of 21.1.1979.
- (2) *Simpson v. Scottish Union Insurance Company*, (1863) 1 *Hemming & Miller* 618 ; 71 E.R. 270.
- (3) *Ratnayake v. Perera*, S.C. 32/81- No. 2332/80- S.C. Minutes of 1.6.1982.
- (4) *Perera v. Municipal Council of Colombo*, (1947) 48 N.L.R. 66.

APPEAL from a judgment of the Court of Appeal.

T. M. S. Nanayakkara for appellant.

Prins Gunasekera with *S. K. S. Sureschandra* and *Miss Hewawasam* for petitioner-respondent.

Cur. adv. vult.

February, 24, 1984.

SHARVANANDA, J.

The petitioner-respondent who was employed as Manager of the respondent-petitioner-society on a monthly salary of Rs. 225 was interdicted from service on 9.10.72. He was served with a charge sheet on 30th August, 1980, about eight years later. The petitioner has by his application dated 29th September, 1980, asked for the issue of a Writ of Mandamus from the Court of Appeal directing the respondent-petitioner-society to pay his half month's salary commencing from the 7th month after his interdiction until the disciplinary inquiry against him was disposed of. The petitioner-respondent founds his application for relief on clause 7 (1) of Circular No. 18/75 dated 23.7.1975 issued by the Secretary of the Co-operative Employees Commission. Clause 7 (1) of the said Circular reads as follows :

"When the salary of an officer who is under interdiction has been stopped and if the disciplinary inquiry is not concluded within six months, the employee is entitled to receive half of his salary from the seventh month till the inquiry is concluded. During the first six months the inquiry may be postponed twice on the application of the accused. Notwithstanding the period of time involved on these two occasions, the employee is entitled to receive half salary for the period exceeding the six months due to the delay on the part of the employer. But after the expiry of six months the period of time granted on application of the employee should not be taken into account for purposes of half salary."

The respondent-society objected to the petitioner-respondent's application for the grant of a Writ of Mandamus on the ground inter alia that it owed no public or statutory duty to the petitioner to pay the sum claimed by the latter ; that the duty, if any, to pay the half month's salary claimed by the petitioner was a duty of a private nature and that hence the application for a Writ of Mandamus was misconceived. The Court of Appeal disallowed the society's objection and following an earlier judgment of that court in *Mendis v. Hakmana Textile Weavers Co-operative Society Ltd.* (1) held that a Writ of Mandamus lay to compel a society such as the respondent-society to pay such half month's salary as prayed for by the petitioner in this case. From the said judgment, the respondent society has preferred this appeal to this court.

The respondent-society is a society registered under the Co-operative Societies Law, No. 5 of 1972.

Section 14 of the Co-operative Employees Commission Act, No. 12 of 1972, provides that—

Any Co-operative Society, and any employee of such society, shall be subject to such directions as may be given by the Commission under this Act, and all decisions of the Commission in the discharge and exercise of its functions and powers under this Act, subject to the provisions of section 11 (2) shall be final and shall be binding on all such Co-operative Societies as are not exempted from the operation of this Act by Order made under section 2 by the Minister and on the employees of such societies.

Section 32 of the Co-operative Employees Commission Act provides—

"Unless otherwise expressly provided, the Commission may make all such regulations as may seem to the Commission to be necessary for carrying out the provisions of this Act or giving effect to the principles thereof, including regulations for all matters for or in respect of which regulations are authorised or required to be made under this Act, and all matters stated or required by this Act to be prescribed."

(2) No such regulation shall have effect until it has been approved by the Minister and notification of such approval has been published in the Gazette.

(3) Upon the publication in the Gazette of any notification under subsection (2) the regulation to which the notification relates shall be as valid and effectual as though it were herein enacted.

Section 25 (1) authorises the making of regulations in respect of recruitment, appointment, termination of services of employees of Co-operative Societies.

Section 25(2) provides that every regulation made in respect of any matter referred to in subsection (1) shall be binding on all Co-operative Societies and their employees.

The circular No. 18 of 1973 does not purport to be a regulation and cannot have the status or attribute of a regulation, duly approved by the Minister and notice of which approval has been published in the Gazette. Hence it cannot attract the statutory force postulated by section 32(3) of the Act. Its significance lies only in it setting down guidelines for co-operative societies.

Counsel for the petitioner-respondent contended that the relevant section which endows the Co-operative Employees Commission with power to issue the Circular No. 18 of 1973 was section 11(1) (e) of the Act which empowers the Commission—

“to determine the procedure or procedures to be followed by any co-operative society in exercising its rights of disciplinary action against its employees, to call upon any co-operative society to complete disciplinary inquiries against its employees within a time stipulated by the Commission, and to hear appeals arising out of any disciplinary orders made by any co-operative society.”

In my view the power to impose an obligation to pay any salary during the period of interdiction of an officer is not referable to the powers of the Commission under this clause 11(1) (e) of the Act. These powers relate to defining or denoting the procedure

governing disciplinary inquiries and the duration of such inquiries and jurisdiction to hear appeals arising from any disciplinary order. The language of that clause does not permit reading into it the power to impose an obligation to pay a salary during the period of interdiction; such a mandate cannot be related to procedure respecting disciplinary inquiries. In any event such directions cannot be elevated to a regulation having statutory efficacy.

Mandamus lies to secure the performance of a public duty, in the performance of which an applicant has sufficient legal interest. To be enforceable by Mandamus the duty to be performed must be of a public nature and not of merely private character. A public duty may be imposed "by either statute, charter or the common law or custom."—Short on Mandamus at page 228.

"It is settled that where an entirely new right is given by statute, Mandamus is the remedy, though it is otherwise where an old right only is enforced"—Per Wood V.C. in *Simpson v. Scottish Union Insurance Company* (2).

"Today the chief function of the Writ is to compel the performance of a public duty prescribed by statute, though it lies as well for the enforcement of common law public duty." Vide *Ratnayake v. Perera* (3).

The Writ will not issue for private purpose, that is to say for the enforcement of a mere private duty stemming from a contract or otherwise. Contractual duties are enforceable by the ordinary contractual remedies such as damages, specific performance or injunction. They are not enforceable by Mandamus which is confined to public duties and is not granted where there are other adequate remedies. *Perera v. Municipal Council of Colombo* (4).

In my view the duty prescribed by clause 7 of Circular No. 18 of 1973 relied on by the petitioner is not in the nature of a public duty such as to attract the grant of a Writ of Mandamus for its enforcement. The instruction which the Co-operative Employees Commission has issued and on which the petitioner respondent bases his application, does not impose a public duty on the respondent-co-operative society to pay half month's salary to an interdicted officer.

The Court of Appeal has overlooked the fact that the authority relied on by the petitioner for the payment of salary to the interdicted officer is only a circular and not a regulation. A circular is not referable to the exercise of any delegated legislative power, it does not prescribe any duty having statutory potential. The judgment of that court in *Mendis v. Hakmana Textile Weavers Co-operative Society Ltd.* (supra) which it followed, discloses the same error.

I set aside the judgment of the Court of Appeal and allow the appeal and dismiss the petitioner-respondent's application with costs fixed at Rs. 750.

SAMARAKOON, C.J.—I agree.

WANASUNDERA, J.—I agree.

WIMALARATNE, J.—I agree.

COLIN-THOME, J.—I agree.

Appeal allowed.
